

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

THE UNITED STATES OF AMERICA
and THE STATE OF COLORADO

Plaintiffs,

v.

ASARCO, INC.,
a New Jersey corporation,

Defendant.

COMPLAINT

The United States of America, by the authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"); and the State of Colorado, by and through the Attorney General of the State of Colorado on behalf of the Colorado Department of Public Health and Environment ("CDPHE") (collectively "the State"), allege as follows:

1. This is an action brought pursuant to Sections 106, 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9606, 9607 and 9613 for injunctive relief and the recovery of response costs incurred and to be incurred by the United States and the State in connection with a facility known as the Vasquez Boulevard/ Interstate 70 Superfund Site, in Denver, Colorado (the "VB/I-70 Site"). Plaintiffs also seek a declaratory judgment, pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), that defendant shall be liable for future response costs that the

United States or the State may incur in connection with the Site.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9606, 9607 and 9613(b).

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c) and 42 U.S.C. § 9613(b), because the release or threatened release of hazardous substances that gives rise to these claims occurred in this district and because the Site is located in this district.

DEFENDANT

4. Defendant Asarco, Inc. is a publicly held corporation organized under the laws of the State of New Jersey. Asarco is the owner of the Globe Smelter Site in Colorado. The Globe Smelter Site is in close proximity to the VB/I-70 Site.

THE SITE

5. The VB/I-70 Superfund Site comprises approximately 4.5 square miles in the north-central portion of the City and County of Denver. The Site is composed of four residential neighborhoods, known as Swansea, Elyria, Clayton and Cole, and portions of two other neighborhoods, Globeville and Curtis Park. There are approximately 4,000 residential properties, 10 schools and seven parks within the VB/I-70 Site.

6. EPA has divided the VB/I-70 Site into three "Operable Units," designated OU1, OU2, and OU3.

7. From at least 1899 until 1903, Asarco operated a smelter, known as the Omaha & Grant Smelter, that was located immediately adjacent to what is now the VB/I-70 Site. This

smelter processed a variety of metals, including gold, silver, copper and lead. Emissions from the Omaha & Grant Smelter's smokestacks deposited metals, including lead, onto the soils of the VB/I-70 Site.

8. Asarco is also the owner of the Globe Smelter, which is located in close proximity to the VB/I-70 Site. Asarco began its smelting operations at the Globe Smelter in 1886, processing a variety of metals including cadmium, lead and copper. Emissions from the Globe Smelter's smokestacks deposited metals, including lead onto the soils of the VB/I-70 Site.

STATE AND EPA ACTIVITIES AT THE SITE

9. Beginning in 1997, the State began a limited soil sampling program in the Elyria and Swansea neighborhoods that are a part of the VB/I-70 Site. This sampling indicated that a number of residential properties were contaminated with lead and arsenic that presented potential threats to human health.

10. As a result of its initial sampling efforts, the State asked EPA to conduct further investigations of the VB/I-70 Site to determine the extent of the contamination. EPA began Phase I of its soil sampling effort in March 1998.

11. In September 1998, EPA issued an Action Memorandum that established the basis for conducting a time critical removal action. The Action Memorandum required that soils be removed and replaced at any property with an average arsenic soil level greater than 450 parts per million ("ppm") and/or lead soil levels greater than 2,000 ppm. EPA selected these "action levels" to protect young children from adverse health effects related to short term exposure to these metals.

12. EPA's Phase I sampling identified 37 residential properties that potentially had lead or arsenic concentrations in excess of EPA's action levels. Additionally, EPA initiated a Phase II sampling effort, which identified another 21 properties with lead and arsenic levels in excess of EPA's action levels.

13. Based upon its sampling efforts, EPA performed removal actions at 18 of the properties that it had identified with lead and arsenic levels in excess of the action levels.

14. In addition to performing removal actions at the most highly contaminated properties, EPA commenced a Remedial Investigation/Feasibility Study ("RI/FS") to assess the long-term threats presented by the lead and arsenic and to evaluate different methods to remediate the Site. Based upon the results of the RI/FS process, EPA issued a Record of Decision ("ROD") pursuant to CERCLA requiring that residential soils that contain lead or arsenic above certain concentration levels be excavated and disposed of properly.

15. EPA placed the Site on the National Priorities List ("NPL") in 1999. The NPL is promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and can be found at 40 C.F.R. Part 300, Appendix B.

16. Together, the United States and the State have incurred in excess of \$15 million in costs responding to releases and threats of releases of hazardous substances at the Site. These costs are not inconsistent with the National Contingency Plan ("NCP"), 40 C.F.R. Part 300, and were incurred for, inter alia, inspecting, evaluating, assessing, monitoring, sampling and analyzing the release or threat of release of hazardous substances at the Site, and for conducting several removal actions and other response actions related to the Site.

FIRST CLAIM FOR RELIEF
(INJUNCTION)

17. Paragraphs 1 through 16 are realleged and incorporated herein by reference.
18. Defendant Asarco is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9602(21).
19. The Site is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
20. “Hazardous substances,” within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) were contained in materials that were disposed of at the Site.
21. There has been a “release or threatened release,” as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), of hazardous substances into the environment at the Site.
22. Defendant Asarco “arranged for the disposal” of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).
23. The Assistant Regional Administrator of EPA Region 8, acting pursuant to his delegated authority, determined in the ROD that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of the release or threatened release of hazardous substances at the Site.
24. Pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), the United States is entitled to such relief from the Defendant as may be necessary to abate the danger or threat to the public interest posed by the release or threatened release of hazardous substances at the Site.

SECOND CLAIM FOR RELIEF
(RESPONSE COSTS)

25. Paragraphs 1 through 24 are realleged and incorporated herein by reference.

26. The United States and the State have incurred costs authorized by Section 104 of CERCLA, 42 U.S.C. § 9604, and defined by Section 101(23), (24) and (25) of CERCLA, 42 U.S.C. § 9601(23), (24) and (25), as a result of the release or threat of release of hazardous substances from the Site.

27. The United States' and the State's actions at the Site were "response" actions as defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

28. The costs incurred by the United States and the State in conducting the response actions were incurred in a manner not inconsistent with the National Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605.

29. The United States and the State will continue to incur response costs in connection with the Site until the Site is cleaned up and all response costs are paid by responsible parties.

30. Defendant is liable to the United States and the State for the payment of response costs incurred as a result of the response actions taken at the Site pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

PRAYER FOR RELIEF

WHEREFORE, the United States of America and the State of Colorado request that this Court enter a judgment against Defendant Asarco, Inc. as follows:

A. Order Defendant to perform the remedy at the Site selected in EPA's Record

of Decision;

B. Order the Defendant to pay all response costs incurred by the United States and the State in response to the release and threat of release of hazardous substances at the Site;

C. Enter a declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), against Defendant on liability that will be binding in any subsequent action to recover further response costs or damages;

D. Award Plaintiffs their costs and disbursements in this action; and

E. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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